

Fishing Year 2013 Sector Carryover Catch Supplemental Information Report

June 10, 2014

United States Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Greater Atlantic Region

Contents

1.0	Background	2
1.1	U.S. District Court Decision and Remedy	2
1.2	Additional Background	3
2.0	Purpose of this Supplemental Information Report	3
3.0	Court-Remedy Action	4
4.0	New Information	5
5.0	New Circumstances	5
6.0	Discussion	5
6.1	General Impacts Discussion	6
6.2	Physical Environment/Habitat/Essential Fish Habitat	6
6.3	Target Species	6
6.4	Non-target Species	6
6.5	Protected Species	7
6.6	Fishing Communities	7
7.0	Conclusion	8
8.0	Preparers and Persons Consulted	8
9.0	References	8

1.0 Background

This report supplements the Environmental Assessment (EA) for Framework Adjustment 51 (FW 51) to the Northeast Multispecies Fishery Management Plan (FMP)(NEFMC 2014).¹ FW 51 was primarily developed and implemented to put in place catch limits for several multispecies stocks, adopt rebuilding programs for Gulf of Maine cod and American plaice, and implement other management measures. The EA for FW 51 evaluated the impacts of the suite of management measures and catch limits put in place for all multispecies stocks for the fishing year that began on May 1, 2014. It is this evaluation that is the primary focus of this supplement as NMFS develops and implements rulemaking to respond to a Federal Court order. This rulemaking may result in accountability measures in the FMP being triggered for sectors that made use of fishing year (FY) 2012 carried over annual catch entitlement (ACE) in FY 2013. This, in turn, may reduce available FY 2014 ACE from the levels outlined and analyzed in the FW 51 EA.

1.1 U.S. District Court Decision and Remedy

The District of Columbia U.S. District Court ruled on April 4, 2014, in *Conservation Law Foundation v. Pritzker, et al.* (Case No. 1:13-CV-0821-JEB) that the carryover system permitted in FW 50 for FY 2013 violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Court invalidated and vacated the portion of FW 50 that permitted carryover catch from FY 2012 for use in FY 2013 and remanded to NMFS the issue for resolution.

FW 50 had been developed and implemented to put in place fishing year (FY) 2013 catch limits and management measures. In addition to the catch and management measures developed by the New England Fishery Management Council (Council), NMFS took two carryover-related actions in conjunction with FW 50: 1. To specify that FY 2013 would be the last year where carried over catch, if used, would not be attributed against the annual catch limit (ACL) for the purpose of determining if accountability measures had been triggered from an ACL overage, and; 2. Issued a clarification under Magnuson-Stevens Act section 305(d) for how carryover catch accounting and accountability would function in FY 2014 and beyond. Included in the clarification for future years was permitting a *de minimis* amount of carryover to be used that would not be subject to accountability measure overage payback.

In response to the remand, NMFS is now developing a rule that will hold individual sectors that used FY 2012 carryover in FY 2013 accountable for ACL overages if both the total fishery ACL and sector sub-ACL are exceeded. If this occurs, FY 2014 individual sector ACE would be reduced pound-for-pound by the amount of carryover used after the *de minimis* amount is removed. If triggered, the accountability measure payback provision would reduce sector ACE in FY 2014. It is this potential reduction in

¹ Framework Adjustment 51 EA can be found online at:
<http://www.nero.noaa.gov/regs/2014/March/14mulfwadjust51ea.pdf>

ACE that this supplement evaluates by comparing the expected FW 51 impacts for FY 2014 catch limits to those that may be in place if carryover payback reductions occur.

1.2 Additional Background

Carried over year-to-year sector ACE has been the topic of frequent discussion in the Northeast since the carryover program was implemented in 2010 as part of Amendment 16 to the Northeast Multispecies Fishery Management Plan (FMP). For brevity, those discussions and issues are not repeated here. NMFS took action in conjunction with FW 50 to the FMP to announce how carryover catch accounting for FY 2013 would function. In the FW 50 rulemaking, we also used Magnuson-Stevens Act section 305(d) authority to provide clarification on how carryover accounting and accountability would function for FY 2014 and beyond. The FW 50 interim final rule published on May 3, 2013, (78 FR 26172) and the final rule published on August 29, 2013, (78 FR 53363). The EA for FW 50 contains additional discussion and analysis of carryover. The EA can be found online: <http://www.nero.noaa.gov/regs/2013/April/13mulfw50ifrea.pdf>.

2.0 Purpose of this Supplemental Information Report

The purpose of this review is to determine and document whether the action being taken to respond to the Court vacatur or new circumstances or information require us to supplement the FW 51 EA.

In making a determination on the need for additional analysis under NEPA, we have considered and have been guided by the Council on Environmental Quality (CEQ) NEPA regulations and applicable case law. The CEQ regulations state,

“[a]gencies shall prepare supplements to either draft or final environmental impact statements if: (i) the agency makes *substantial* changes in the proposed action that are relevant to environmental concerns; or (ii) there are *significant* new circumstances or information relevant to environmental concerns *and* bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.09(c) (emphasis added).

In addition, we have considered CEQ’s “significance” criteria at 40 C.F.R. § 1508.27 and the criteria relied upon for the April 22, 2013 FONSI to determine whether any new circumstances or information are “significant,” thereby requiring supplementation of the FW 51 EA.

This report first describes the proposed action and compares it to the action analyzed in the FW 51 EA. It then considers whether there are any significant new circumstances or information that are relevant to environmental concerns and have a bearing on the proposed action or its impacts. For the consideration of new circumstances and information, NMFS has consulted available information to determine whether a supplemental environmental assessment (SEA) should be prepared.

3.0 Court-Remedy Action

Carryover of unused FY 2012 sector ACE for use in FY 2013 was implemented and analyzed as part of FW 50 to the FMP. In this action, NMFS would replace the FW 50 provisions deleted by the Court with measures that require an accountability measure for a sector that harvests its carryover catch in FY 2013 if the sectors sub-ACL and the overall ACL are exceeded. This accountability is on a per stock basis. The accountability measure is a pound-for-pound reduction (or “payback”) of that sector’s FY 2014 ACE equal to the carryover used after removing the de minimis amount. Accountability measures, if triggered, would reduce the FY 2014 sector ACE from levels outlined in FW 51 and analyzed in the associated EA.

The following stepwise evaluation process provides a detailed explanation of when and how the payback accountability measure would be triggered and assessed:

Step 1: Has the total fishery level ACL for a stock been exceeded?

- No--There is no reduction in FY 2014 ACE for that stock required (i.e., no repayment required). Other components of the fishery underutilized their available catch limits for that stock sufficient to offset any carryover used.
- Yes--Proceed to step 2.

Step 2: Has the sector sub-ACL (i.e., sum total of all sector ACE) been exceeded?

- No--There is no reduction in FY 2014 ACE for that stock required (i.e., no repayment required). Even though the total fishery-level ACL was exceeded, sectors collectively did not exceed their sub-ACL for that stock. While some sectors may have used carryover for that stock, other sectors did not or underutilized available ACE for that stock by enough to offset the carryover used resulting in total catch less than the sub-ACL.
- Yes—Proceed to step 3.

Step 3: After sectors’ FY 2013 catch reconciliation with NMFS has occurred, determine which sectors used FY 2012 carryover ACE for a stock. For each of those sectors, determine the amount of carryover used that must be deducted from that sector’s FY 2014 ACE as follows:

- Step 3a: Subtract the de minimis carryover amount for that stock from the carryover amount used by the sector. The de minimis amount was recently determined to be 1 percent of the FY 2013 sector sub-ACL subdivided to the sectors according to their percent sector contribution per stock.
- Step 3b: Reduce the sector’s FY 2014 ACE for that stock by the amount calculated in Step 3a. This is the equivalent to a pound-for-pound payback of FY 2012 carryover used minus the de minimis allowance.

4.0 New Information

The second part of the inquiry to determine whether an SEA is required involves a two-step process. First, one must identify new information or circumstances. Second, one must analyze whether these are significant to the analysis of the action and relevant to environmental concerns on the action or its impacts.

The Court's decision to invalidate and vacate carryover very late in FY 2013 means that the only remedy available would be developed after the fact. The Court was very clear that it did not expect NMFS to be able to enact rulemaking before the end of the fishing year. Thus, the only new information to analyze is how much FY 2012 to FY 2013 carryover catch has been used by stock/species and if the sub-ACL or total ACL triggers have been exceeded which, in turn, causes the accountability measure payback to occur. If payback occurs, the FY 2014 sector ACE would be reduced from the levels contemplated in FW 51's analysis.

To date, this new FY 2013 catch information is incomplete. Preliminary information is available on sector catch, including carryover use, for FY 2013 but the full catch reporting reconciliation process is not yet final. Final total catch, inclusive of state water and other fishery components that also take groundfish, will not be available until September 2014 or later. A more detailed discussion of the preliminary catch information, likelihood that the accountability measure will be triggered for any stock, and the subsequent impacts the pound-for-pound payback may have is provided in Section 6.0 of this document. The new information on how a pound-for-pound payback that would reduce FY 2014 sector ACE is the primary reason NMFS has developed this report.

5.0 New Circumstances

Section 1.0 outlines the events leading up to and the outcome of the Court's decision regarding carryover. The late-season change of invalidating and vacating FW 50's carryover accounting approach comprise the new circumstance to which NMFS is responding. While the Court's decision irrevocably changes how carryover accounting and accountability functions, it does not result in impact that is substantially different than that analyzed in FW 51's EA for the FY 2014 catch limits.

6.0 Discussion

Section 6.0 of the EA supporting FW 51 discusses anticipated impacts for the various management and catch limit measures being implemented for fishing year 2014. The impacts analyzed in the EA were grouped into the following 5 valued ecosystem components (VEC):

- Physical Environment/Habitat/Essential Fish Habitat
- Target species – groundfish stocks

- Non-allocated target species and bycatch – non-groundfish stocks including monkfish, dogfish, and skates
- Protected resources
- Human communities

6.1 General Impacts Discussion

There are no expected impacts associated with the carryover remedy being put in place for FY 2012 carryover catch use in FY 2013. The majority of stocks will not have any accountability measure repayment triggered because the total catch does not meet the threshold criteria for requiring payback. For those stocks where a payback is or may be triggered, available information through late May 2014 indicates that the reduction in FY 2014 ACE would not result in a different outcome of the impact analyses performed for FY 2014 as part of FW 51. The potential reduction in FY 2014 ACE that may occur if pound-for-pound payback is required is not expected to appreciably reduce fishing effort from the levels analyzed in the FW 51 EA. The potential overages are expected to be small, if necessary, and none of the stocks involved are expected to constrain the sectors ability to fish for other stocks. As such, this is not expected to change the potential impacts on any VEC as analyzed in the FW 51 EA.

6.2 Physical Environment/Habitat/Essential Fish Habitat

The overall catch limits for FY 2014 would not be appreciably changed by the potential carryover accountability change being developed by NMFS. Some sectors, if required to payback carryover catch, may have less ACE available in FY 2014. Current analyses of preliminary end-of-year FY 2013 catch information indicate a small repayment (i.e., reduction) of FY 2014 ACE is possible for American plaice and witch flounder. This change in ACE, if triggered, is not expected to change fishing behavior in terms of frequency, duration, or location. Because fishing behavior is not expected to change if ACE for these two stocks is slightly reduced in FY 2014 the Court remedy action is not expected to have a higher or lower impact on the physical environment than what was analyzed in the FW 51 EA.

6.3 Target Species

Similar to the discussion under physical environment impacts (Section 6.2, above), any FY 2014 ACE reduction, if necessary, is expected to be minor. Any reduction would not be expected to change fishing behavior, nor would the action make available more total ACE for sectors or overall quota for other fishery components. Sectors continue to be prohibited from exceeding their annual allocation. As a result, the Court remedy action is not expected to have a different impact on target species beyond the impacts predicted and analyzed in the FW 51 EA.

6.4 Non-target Species

Similar to the discussion under physical environment impacts (Section 6.2, above), any FY 2014 ACE reduction, if necessary, is expected to be minor. Any reduction would not

be expected to change fishing behavior, nor would the action make available more total ACE for sectors or overall quota for other fishery components. Sectors continue to be prohibited from exceeding their annual allocation. As a result, the Court remedy action is not expected to have a different impact on non-target species beyond the impacts predicted and analyzed in the FW 51 EA.

6.5 Protected Species

Similar to the discussion under physical environment impacts (Section 6.2, above), any FY 2014 ACE reduction, if necessary, is expected to be minor. Any reduction would not be expected to change fishing behavior, nor would the action make available more total ACE for sectors or overall quota for other fishery components. Sectors continue to be prohibited from exceeding their annual allocation. As a result, the Court remedy action is not expected to have a different impact on protected species beyond the impacts predicted and analyzed in the FW 51 EA.

6.6 Fishing Communities

Sector comparison report and catch data available through May 30, 2014, indicate that the sector sub-ACL has been exceeded for witch flounder. No other stocks have met the second criteria for triggering the accountability measure, i.e., catch for the other groundfish stocks remains below sub-ACL. This includes American plaice. The catch information for plaice indicates sector catch is near the sub-ACL but has not exceeded it, meaning the payback trigger criteria are not met. Irrespective of where final catch is after all data have been compiled, sectors would not have to repay any used carryover for stocks other than witch flounder. It remains to be seen if the total ACL will be exceeded for these two stocks. That information will not be available until September 2014.

If the total witch flounder ACL is exceeded once final data are compiled in September, 6 individual sectors would pay back a total of approximately 85,000 lb of carryover used. The range of repayment is from 3,100 to 48,000 lb per sector. The Quota Change Model (QCM) used to predict both potential FY 2014 quota utilization and project revenues for those landings indicates that witch flounder is not expected to fully achieve the sector sub-ACL in FY 2014. The model projects the FY 2014 utilization of the 601 mt witch flounder ACL to be 98 percent. Sectors may repay up to 38.5 mt (85,000 lb) for the FY 2012 carryover used in FY 2013 that exceeded the available ACE and *de minimis* carryover amount. This is approximately 6 percent of the witch flounder ACL; therefore, if total catch for all fishery components is achieved, only 94 percent of the ACL can be utilized as a result of the repayment. The 4 percent difference between potentially available ACL and the QCM predicted utilization of 98 percent is unlikely to have a discernable economic or other impact. The QCM projects 99 percent of Gulf of Maine (GOM) cod will be used in FY 2014, meaning it is the most constraining stock. In Southern New England, the QCM projects 100 percent of the yellowtail flounder stock will be taken. When sectors no longer have either GOM cod or Southern New England yellowtail flounder available, they must either cease fishing in the stock area or, if possible, acquire additional ACE to continue fishing. It is likely cod and yellowtail will be the first species that limit sector operations. Even if the potential change to witch flounder utilization if the accountability measure is eventually triggered, it is not

expected that the economic impact on sectors will differ from those analyzed in FW 51's EA. This is because witch flounder will still not be limiting if the accountability measure is triggered.

Intuitively, sectors that may have their FY 2014 witch flounder ACE reduced by the accountability repayment may incur some economic impact through either lost landing revenues, lost lease or transfer revenues, or increased operational costs as the result of leasing in additional witch flounder ACE if it limits their respective operations. These potential losses cannot be reasonably predicted or quantified. Impacts are expected to be nominal given the small repayment that may be possible as a 'worst case scenario' based on current information. As a result, given the available information, the potential economic impact of a witch flounder carryover-related payback AM, if triggered, is expected to be minimal. Thus, any impact on fishing communities resulting from potential ACE reduction (i.e., payback) is expected to be nominal.

7.0 Conclusion

After considering the relevant new circumstances, NMFS has determined there is no need to supplement the FW 51 EA and FONSI because: (1) the changes to the proposed action that are relevant to environmental considerations are not substantial; and (2) the new circumstances and relevant to environmental concerns and bearing on the proposed action or its impacts are not significant under NEPA. Therefore, the 2014 FW 51 EA and FONSI remain valid and NMFS will continue to rely on them to support the Court remedy action.

8.0 Preparers and Persons Consulted

Preparers:

Michael Ruccio, Groundfish Policy Analyst, NMFS Greater Atlantic Regional Fisheries Office, Gloucester Massachusetts.

Chad Demarest, Economist, Northeast Fisheries Science Center, Wood's Hole Massachusetts

Timothy Cardiasmenos, NEPA Policy Analyst, NMFS Greater Atlantic Regional Fisheries Office, Gloucester Massachusetts.

9.0 References

New England Fishery Management Council (NEFMC). 2014. Framework Adjustment 51 to the Northeast Multispecies Fishery Management Plan, Including an Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis. Newburyport, MA. 318 pp. Available at: <http://www.nefmc.org/nemulti/index.html>.